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No. 06-1380

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In the Supreme Court of the United States

ESTATE OF ELLA M. PARKER,

Petitioner,

v.

SEDONA GOLF RESORT, L.C.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

As we demonstrated in the petition, this Court's review of the Ninth Circuit's rigid holding that judicial estoppel is *per se* unavailable when a court accepts a party's prior inconsistent position in a decision that thereafter is reversed on appeal is warranted because that holding (i) deepens a circuit split on this issue (Pet. 9-12) and (ii) is clearly incorrect, reflecting a conception of the purposes of the judicial acceptance requirement that undervalues the importance of protecting the integrity of the judicial process (Pet. 12-19; see also *New Hampshire* v. *Maine*, 532 U.S. 742, 749-750 (2001)).

Respondent's brief in opposition is notable for what it does not contest: that it would be inconsistent with the purposes of the judicial estoppel doctrine—and particularly with the preeminent purpose of protecting the integrity of the judicial process—to refuse to apply that doctrine merely because a court decision adopting the prior inconsistent position was reversed on appeal. See Pet. 14-16.[1] That implicit concession is crucial because the arguments that respondent does advance for denying the petition—that the Ninth Circuit did not establish a *per se* rule in this case and that there is no circuit conflict on the question presented—rely on tortured interpretations of judicial opinions that actually are quite unambiguous in establishing the contrary. Assuming that courts say what they mean and mean what they say, this Court should reject respondent's attempt to conjure away the circuit split and should grant the petition.

1. Respondent's assertion that the Ninth Circuit did not establish a *per se* rule in this case can be dispensed with

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[1] See also Brief in Opp. 4 n.1 (asserting that *Coal Resources, Inc.* v. *Gulf & Western Industries, Inc.*, 865 F.2d 761 (6th Cir. 1989), which precluded the invocation of judicial estoppel if the judgment adopting the prior inconsistent position was reversed on appeal, is "of questionable relevance" in light of *New Hampshire*).

quickly. In its decision, the Ninth Circuit stated plainly that "[w]hen a party advances a position that is ultimately rejected on appeal, that party may advance an alternative theory in future proceedings with no 'risk of inconsistent court determinations.'" Pet. App. 3a (citing *New Edge Network, Inc.* v. *F.C.C.*, 461 F.3d 1105, 1114 (9th Cir. 2006) (quoting *New Hampshire*, 532 U.S. at 751)). It is hard to imagine how the Ninth Circuit could have spoken more unequivocally.

This Court established in *New Hampshire* that the "risk of inconsistent court determinations" is the touchstone for a finding of judicial acceptance. 532 U.S. at 750-751 (internal quotation marks omitted); cf. *New Edge Network*, 461 F.3d at 1114 (holding there to be "no risk of inconsistent court determinations" *because* court "did not adopt [prior] position" (internal quotation marks omitted)). Thus, the Ninth Circuit clearly upheld the bankruptcy court's refusal to invoke judicial estoppel on the sole ground that a finding of judicial acceptance was precluded by the district court's intervening rejection of the bankruptcy court's initial grant of summary judgment, in which the bankruptcy court had adopted the prior inconsistent position on mutual mistake.[2] There is no support in the Ninth Circuit's decision for respondent's wishful characterization of that ruling as simply "point[ing] out"

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[2] Immediately prior to establishing the *per se* rule precluding a finding of judicial acceptance if there had been reversal of the decision accepting the prior inconsistent argument, the Ninth Circuit observed that "[respondent] gained no 'unfair advantage' from [initially] advancing the position that the Rodriguez deed of trust resulted from mutual mistake * * * *because*" the initial grant of summary judgment had been reversed. Pet. App. 3a (internal citation omitted, emphasis added). Under any natural reading of the decision, this determination was not arrived at independently but rather through application of the *per se* rule enumerated thereafter. In any event, this language reinforces the inescapable conclusion that the court erroneously viewed the fact of reversal to be determinative of the judicial estoppel analysis.

that "based on the facts presented there was no risk of inconsistent determinations." Br. in Opp. 4. Indeed, one searches the Ninth Circuit's judicial estoppel analysis in vain for *any* discussion of the "facts presented" in the case.

Respondent is, of course, correct that the Ninth Circuit "concluded that the bankruptcy court did not abuse its discretion in declining to apply the doctrine of judicial estoppel." Br. in Opp. 4-5. But what is relevant for the purposes of this petition is *why* the Ninth Circuit determined that there had been no abuse of discretion. As the opinion demonstrates, the sole ground for that determination was the application of a *per se* rule of law.

2. Respondent next asserts that *Hamilton* v. *State Farm Fire & Casualty Co.*, 270 F.3d 778 (9th Cir. 2001), demonstrates that "[t]he doctrine of judicial estoppel in the Ninth Circuit * * * is neither rigid nor *per se* as petitioner suggests with respect to the 'judicial acceptance' factor." Br. in Opp. 6. In *Hamilton*, which addressed the situation of a debtor who attempted to bring claims that he had knowingly failed to disclose during his bankruptcy discharge proceedings, the Ninth Circuit held that "a discharge of debt by a bankruptcy court * * * is sufficient acceptance to provide a basis for judicial estoppel" of later pursuit of those claims, "even if the discharge is later vacated." 270 F.3d at 784. Respondent's position constitutes an over-reading of *Hamilton* for two reasons.

First, contrary to respondent's suggestion, Br. in Opp. 5-6, the Ninth Circuit did not rely on *Hamilton* as establishing a rule of "flexibility to apply judicial estoppel" in the circumstances of this case. Instead, *Hamilton* was cited solely as a source for the quotation "unfair advantage." Pet. App. 3a.

Second, *Hamilton* was decided in the specific context of a bankruptcy court's discharge of debt—a consideration that amply explains the Ninth Circuit's apparent determination that *Hamilton* did not control the present case. Such a discharge implicates special concerns of fairness to the court

and creditors that are not necessarily relevant in other contexts. Indeed, the *Hamilton* court justified its invocation of judicial estoppel in part by pointing to considerations that are unique to the specific context of a debt discharge in bankruptcy. See *Hamilton*, 270 F.3d at 785 ("In this case, we must invoke judicial estoppel to protect the integrity of the bankruptcy process. The debtor, once he institutes the bankruptcy process, disrupts the flow of commerce and obtains a stay and the benefits derived by listing all his assets."). Thus, the *Hamilton* court's particularized concerns with the "integrity of the bankruptcy process" in the context of a discharge of debt led it to adopt a broad reading of the "judicial acceptance" factor *in that specific context*.

Of course, the Ninth Circuit could have applied broadly the principles established in *Hamilton* and extended the rule established therein to the context of this case—a bankruptcy court decision accepting a factual assertion in the course of an adversary proceeding. Indeed, petitioner's position is that the Ninth Circuit *should* have done just that and that cases such as *Hamilton*, and the Eighth Circuit's similar holding in *Stallings* v. *Hussman Corp.*, 447 F.3d 1041 (8th Cir. 2006), are relevant precedents bearing on the merits of the question presented for review in this petition. See Pet. 2, 10-11. But the Ninth Circuit declined to adopt that approach, and instead applied a *per se* rule.

3. Even if the approach taken by the Ninth Circuit in *Hamilton* and the *per se* rule adopted in the present case were somehow in tension, the circuit conflict presented by this case could not be resolved by the Ninth Circuit's reconciliation of those precedents. As we noted in the petition (at 2, 9, 11), established precedent in the Sixth Circuit also precludes the invocation of judicial estoppel if the judgment adopting the prior inconsistent position has been reversed on appeal. See *Coal Res.*, 865 F.2d at 773. Respondent dismisses *Coal Resources* as "of questionable relevance" because it "predates *New Hampshire* * * * by more than twelve years." Br.

in Opp. 4 n.1. But the case remains the law in the Sixth Circuit, and thus exerts an ongoing impact on the expectations of litigants. Moreover, although this Court's analysis in *New Hampshire* provides important guidance on the appropriate overall approach that courts should adopt in defining "judicial acceptance" (see Pet. 12-13), *New Hampshire* neither addressed specifically the question raised by this petition nor enumerated any relevant principles that were not already established at the time that *Coal Resources* was decided. Therefore, there is no guarantee that the Sixth Circuit would decide the issue presented in *Coal Resources* any differently today, absent further specific guidance from this Court.

4. Respondent's contention that the Seventh Circuit's decision in *Carnegie* v. *Household International, Inc.* stands for something other than what it says—that "reversal need not affect the application of judicial estoppel" (376 F.3d 656, 660 (7th Cir. 2004) (Posner, *J.*))—is also unavailing. Respondent's attempt to rewrite the decision is premised solely on the contention that it "dealt with a 'novel issue[],' and apparently is *sui generis*." Br. in Opp. 6 (quoting *Carnegie*, 376 F.3d at 658). But, that *Carnegie* dealt with a "novel" issue—"the bearing of the doctrine of judicial estoppel on class action litigation"—has no relevance to whether the rule enumerated therein, which does not even address that specific issue, applies generally. *Carnegie*, 376 F.3d at 658. In fact, the discussion in *Carnegie* of the effect of reversal on the applicability of judicial estoppel was in no way limited to the class action context. Furthermore, in addition to enumerating a general rule, the Seventh Circuit also engaged in an extended discussion of the principles underlying that rule—a discussion that, again, made no reference to any specific context. See *id.* at 660; Pet. 10-11.[3]

[3] Respondent's representation that "it was important to the appellate court that '* * * the defendants benefited from the temporary approval of the settlement, which they used to enjoin other * * * litigation against them* * *'" (Br. in Opp. 7 (quoting *Carnegie*,

That *Carnegie* is the only case in which the Seventh Circuit clearly has held that "reversal need not affect the application of judicial estoppel" (see Br. in Opp. 7) is also irrelevant. Respondent cites no Seventh Circuit case that purports to cast doubt upon, or even to limit, that holding—only a district court decision that confirms petitioner's interpretation of the rule established therein. See *ibid.* (quoting *Crosby* v. *Bowater Inc. Ret. Plan for Salaried Employees of Great N. Paper, Inc.*, 2006 U.S. Dist. LEXIS 67144, at *23 (N.D. Ill. Sept. 1, 2006)).

5. Finally, respondent misinterprets petitioner's contention that the Ninth Circuit decision in this case was clearly incorrect. Br. in Opp. 9 (citing Pet. 12). Petitioner's point is not that "the Ninth Circuit misapplied the properly stated rule of law with respect to judicial estoppel" (*ibid.*), but rather that it applied a rule of law—that "[w]hen a party advances a position that is ultimately rejected on appeal, that party may advance an alternative theory in future proceedings with no risk of inconsistent court determinations," Pet. App. 3a (internal quotation marks omitted)—that was improper. Moreover, respondent's vague defense of the analysis conducted by the bankruptcy court and the district court is largely beside the point, since the petition provides ample basis for this Court to conclude that the Ninth Circuit's analysis of the judicial estoppel issue could have come out in petitioner's favor had the court applied the correct rule of law. Pet. 17-19.

* * * * *

F.3d at 660)) is a curious way to characterize an observation that the *Carnegie* court introduced with "[a]nyway" (*Carnegie*, F.3d at 660). In any event, the argument that respondent did not benefit from its switch in position—or, more to the point here, that the switch was detrimental to petitioner—is one that respondent should advance in the Ninth Circuit on remand. As we demonstrated in the petition, the record here provides ample support for the proposition that there was a detriment to petitioner. Pet. 17-19.

Although this Court's judicial estoppel holdings have been couched in the language of discretion, the circuits understandably have interpreted *New Hampshire* and its progeny (see, e.g., *Cleveland* v. *Policy Mgmt. Sys. Corp.*, 526 U.S. 795 (1999)) as establishing that the acceptance of an initial position by a court or agency is a prerequisite to the application of judicial estoppel. See, e.g., *Montrose Med. Group Participating Sav. Plan* v. *Bulger*, 243 F.3d 773, 782 (3d Cir. 2001) ("Guided by *Cleveland*, we hold that it does not constitute bad faith to assert contrary positions in different proceedings when the initial claim was never accepted or adopted by a court or agency."). Therefore, it is incumbent on this Court to ensure that the standard is applied properly. A sharp divergence has emerged between (at least) the Ninth Circuit and the Seventh and Sixth Circuits as to whether judicial estoppel is available when a court accepts a party's prior inconsistent position in a decision that thereafter is reversed on appeal. Further review by this Court is essential to resolve this conflict on an important and recurring issue and to correct the erroneous position adopted by the Ninth Circuit in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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